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In the Supreme Court of the United States.

OCTOBER TERM, 1985.

TOWN OF NEWTON, ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of the Town of Milton, Massachusetts, Amicus Curiae, In Support of the Town of Newton, New Hampshire.

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Interest of Amicus Curiae.

Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, the Town of Milton, Massachusetts ("Milton"), submits this brief in support of the petitioners. The brief is presented for the Town of Milton, a political subdivision of the Commonwealth of Massachusetts, and is sponsored by Robert D. O'Leary, the town counsel and authorized law officer thereof.

As a municipality, Milton has a vital interest, in general, in ensuring that its police and other law enforcement personnel are able fairly and efficiently to carry out their duties. It is Milton's position that this interest is stifled by the recent adoption by the United States Court of Appeals for the First Circuit of a *per se* rule invalidating release agreements entered into by individuals facing criminal charges. This rule will severely hamper all municipalities in the exercise of their police powers, since they will not be able to expeditiously dispose of minor violations prior to trial but will be forced to prosecute all minor offenses in order to protect law enforcement personnel from unwarranted civil rights lawsuits. Since the use of releases has previously and repeatedly been upheld in Massachusetts, and since a release of the right to appear for arraignment in exchange for being discharged from custody has been officially approved by the Attorney General of Massachusetts, the issues raised in the instant case are of significant concern to Milton.

More particularly, Milton is a party to an action pending before the United States Court of Appeals for the First Circuit. *Hall* v. *Ochs*, No. 85-1993, which also involves the validity of a release executed by an individual who had been arrested for criminal offenses. The *Hall* case is scheduled for argument in the September, 1986 session of the First Circuit at Boston.

The Milton police arrested Bancroft D. Hall, the plaintiff, after the police responded to a telephone call by a citizen who was concerned about what appeared to be a breaking and entering into a dwelling and Hall, according to the police, would not identify himself by producing the registration for and license to operate the motor vehicle that he was in.

After the police brought Hall to the police station, a police lieutenant investigated Hall's presence at the dwelling. He concluded that Hall was not involved in a breaking and entering but also was satisfied that Hall was guilty of disturbing the peace and the statutory crime under Massachusetts General Laws,

Chapter 90, § 21 of refusing on demand of a uniformed police officer to produce his license and registration.

Massachusetts law, however, compels a police officer who makes a warrantless arrest to bring a person arrested before a magistrate unless the arrested individual waives that right. In the absence of waiver, failure to bring the arrested person before a magistrate makes the confinement false imprisonment.

Therefore, the police lieutenant told Hall that he had the option of bail or going before a magistrate and as an exercise of discretion, the lieutenant also offered Hall the further option of signing a waiver of his right to go before a magistrate and a release of claims against the police officers. After discussion with a friend, his daughter and his lawyer, Hall agreed to sign the waiver and release. He was promptly released. The police brought no charges against him.

Later, Hall commenced an action in the United States District Court for the District of Massachusetts alleging that he was falsely arrested and imprisoned in violation of state law and 42 U.S.C. § 1983. At trial the district judge directed the jury to return a verdict in favor of Hall against the police lieutenant and Milton for demanding a waiver and release. The jury returned a verdict against the remaining defendants and the court entered judgment in favor of Hall totalling $525,696.02.

Summary of Argument.

The Town of Milton, Massachusetts, supports the Town of Newton, New Hampshire, in this appeal. Whether a release is executed in a confinement or non-confinement environment, this Court should not adopt a *per se* rule invalidating releases or covenants not to sue public officials but rather approve the validity of releases executed in a voluntary, deliberate and

informed manner (Br. 5-7). Massachusetts as well as California considers releases of claims for false arrest and imprisonment valid in the absence of duress and coercion (Br. 7-8). Rejection of the Court of Appeals' *per se* rule would make the treatment of releases consistent for both federal civil rights claims and state tort actions for assault and false arrest and imprisonment arising out of the same occurrence. There are strong reasons of public policy in favor of releases. Massachusetts requires the police to bring a person arrested without a warrant before a magistrate but there may be circumstances that the police and the person arrested want to waive that right and drop the charges. A waiver of the right to appear before a magistrate is as a matter of Masssachusetts law a release (Br. 8-11). Furthermore, there is sound public policy in favor of terminating disputes. If civil rights claims cannot be settled in exchange for dropping criminal charges, municipalities would have great difficulties in the settlement of a civil rights claim (Br. 11). Releases in this context are very similar to plea bargains (Br. 12-13). The Court has fully endorsed the policy in favor of plea bargains. Finally, Congress is in the best position to decide what the public policy should be within this area (Br. 14).

Argument.

I. This Court Should Reverse the Decision of the Court of Appeals for the First Circuit Which Holds That Release Agreements Are Per Se Invalid As a Matter of Federal Public Policy, and Should Adopt the Case by Case Approach Already Sanctioned by Some Circuits.

A. *This Court Should Establish a Rule Upholding Releases Which Are Executed in a Voluntary, Deliberate and Informed Manner.*

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit addressed the issue of the validity of a release of civil rights claims under 42 U.S.C. § 1983, executed by a prisoner. The court stated that the validity of the release of civil rights claims would be subject to scrutiny to determine whether the decision to execute the release was "voluntary, deliberate, and informed." *Id.* at 1203. The court, therefore, concluded that the validity of the release was a factual question suitable for a jury.

The "voluntary, deliberate, and informed" standard for assessing the validity of a release of civil rights claims, announced in the *Jones* case, was recently adopted by the Court of Appeals for the Fourth Circuit in *Bushnell* v. *Rossetti*, 750 F.2d 298, 302 (4th Cir. 1984). In the *Bushnell* case, the court upheld the validity of a release based upon an application of this standard to the circumstances surrounding the release agreement. The court specifically rejected an argument that "agreements releasing civil rights in exchange for criminal sentencing consideration are void as against public policy." *Id.* at 300. Based upon the facts that

Bushnell understood the significance of the release, consulted his attorney, and received a benefit, the court upheld the district court's determination that the decision to enter into the release agreement was voluntary, deliberate and informed. *Id.* at 302.

In refusing to adopt a *per se* rule of invalidity with regard to releases of civil rights, the court in the *Bushnell* case refused to expand upon the alternative holding in *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975). In the *Boyd* case, after holding on the particular facts presented that a release agreement was ineffective as a waiver of rights since it was neither a voluntary nor an intelligent waiver, the court stated as an additional reason for its decision that the particular release at issue in that case was void as against public policy. *Id.* at 88-89. The court in *Boyd* relied on *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), and *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970).

The *Bushnell* court distinguished the *Boyd*, *Dixon* and *MacDonald* cases on the grounds that all involved instances of "abuse of prosecutional powers." *Id.* at 301. In any event, none of the cases announced a *per se* rule against the validity of releases.

B. *A Case-By-Case Approach to Determining the Validity of Release Agreements Is Appropriate in All Contexts.*

In the *Jones* case, which formulated a "voluntary, deliberate and informed" standard for determining the validity of releases of claims under § 1983, the court did not limit the applicability of the rule to certain contexts, such as post-conviction and presentencing situations. Rather, the court announced the standard with respect to releases of claims under § 1983 in general. *Jones* v. *Taber*, 648 F.2d at 1203. In discussing the objective factors to be taken into account in applying the standard, the court identified the "presence of a noncoercive

atmosphere for the execution of the release" together with the significance, under the particular circumstances, of the absence of such an atmosphere. *Id.* at 1204. Factors which the court considered important in judging whether any arguable coercive atmosphere was dissipated are the presence of an attorney representing the party signing a release, and a neutral environment. The court stated as follows: "We do not foreclose a finding of a voluntary release when the release is entered into by a prisoner without presence or assistance of counsel, but these circumstances must be weighed carefully." *Id.* at 1205.

C. *A Voluntary, Deliberate and Informed Standard of Analyzing the Validity of Releases Is in Harmony with Well Reasoned State Authorities.*

Under Massachusetts law, it has been long established that releases of claims for the state torts of false arrest and false imprisonment executed in the criminal arrest context are valid in the absence of coercion or duress, *Doherty* v. *Shea*, 320 Mass. 173, 68 N.E.2d 707 (1946); *Keefe* v. *Hart*, 213 Mass. 476, 481-482, 100 N.E. 558 (1913).

In the *Doherty* case the plaintiff, who had been arrested without a warrant for public drunkenness, later brought an action against the arresting officer. The arresting officer had not filed a criminal complaint against the plaintiff nor brought him to court prior to the plaintiff's release from custody. The court noted that the plaintiff had a right to be brought to court after he was arrested and stated that the officer's failure to bring a complaint "rendered the officer liable for false imprisonment." *Doherty* v. *Shea*, 320 Mass. at 175, 68 N.E.2d at 708. However, the court added:

> But the person arrested may waive his right to be brought to court and secure his discharge from cus-

> tody by agreeing with the arresting officer or the one holding him in custody that, if discharged, he will not hold him liable for detention, or by signing a release.

Id. See also *Wax* v. *McGrath*, 255 Mass. 340, 151 N.E. 317 (1926); *Horgan* v. *Boston Elevated Railway Co.*, 208 Mass. 287, 94 N.E. 386 (1911) and *American Railway Express Co.* v. *Stone* 27 F.2d 8 (1st Cir. 1928).

In a recent decision of the Supreme Court of California, moreover, the validity of a release which was "freely and voluntarily" executed was upheld in the face of an argument that such an agreement was against public policy. *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 607, 608-609, 620 P.2d 628, 631-632 (Cal. 1980).

II. There Are Strong Public Considerations Which Support Upholding the Validity of Release Agreements Which Are Entered into in a Voluntary, Deliberate and Informed Manner.

A. *Upholding the Validity of Releases Allows Needed Flexibility in the Exercise of the Police Power in the Public Interest.*

It is in the interest of the public for states to exercise their police powers in a manner which adequately protects the public health, safety, and welfare and, at the same time, allows flexibility for responding to the needs of specific circumstances. The availability of release agreements provides a practical method for allowing police, prosecutors and other law enforcement officials to exercise reasonable judgment in dealing with public offenses. Moreover, as the court in the *Hoines*,

supra, pointed out, release agreements often arise in the context of settling minor offenses. *Id.* at 610 n.7, 612. It is often in the best interests of the public and the defendant, to have minor misdemeanors disposed of without pressing charges as was pointed out by a lower court judge in California, and quoted with approval in the *Hoines* case:

> Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable.

Id. at 610 n.7. This rationale applies in both the context of release-dismissal agreements and release-discharge agreements in which an individual is released from custody.

In Massachusetts, as previously discussed, the courts have repeatedly upheld the validity of release agreements executed by individuals under arrest who wish to waive their rights to appear in court for arraignment and to sue for false arrest and false imprisonment in exchange for being released without charges being brought. These agreements allow for the reasonable resolution of minor offenses. The police are able to respond immediately to perceived public safety problems. Prosecution of individuals may be reasonably avoided in appropriate circumstances, thereby conserving scarce law enforcement resources. As a result, the interests of the public are best served by not prosecuting everyone arrested for a minor offense.

As a practical matter, if a reasonable judgment is made in particular circumstances that criminal charges are not going to be pressed, it is vital that a mechanism exist to protect law enforcement personnel from unwarranted civil lawsuits. In

many instances, if charges are not immediately pressed and a civil action is subsequently brought, at some later date, for false arrest or false imprisonment, or for violation of civil rights based upon such allegations, law enforcement personnel may be disadvantaged in producing evidence to substantiate the grounds for the detention due to the time delay. The alternative protection would be to immediately press charges in all arrest situations. This would clearly not serve the public welfare.

Upholding the validity of releases, on the other hand, will not encourage police misconduct or prosecutorial abuse. By subjecting release agreements to a test of voluntary, deliberate and informed choice, legitimate complaints will be aired, and instances of abuse will be subject to scrutiny. The actions of both police and prosecutors should be subject to review to ensure that the system is operating in a fair and even-handed manner.

But it should not be presumed that law enforcement personnel are engaged in misconduct and abusive practices. However, this is exactly the presumption that the First Circuit Court of Appeals employed in reaching its result in the instant case. The court stated in *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (April 21, 1986):

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.

This view of law enforcement activity is unfair. Does the Court of Appeals seriously believe that prosecutors "trump up charges"

in reaction to civil rights suits? Has this Court of Appeals even had such a case? Does the court believe that prosecutors as officers of the court "suppress evidence of police misconduct?"

B. *Upholding the Validity of Releases Which Are Entered into in a Voluntary, Deliberate and Informed Manner Permits the Settlement of Civil Rights Cases in Appropriate Circumstances.*

If this Court sanctions the *per se* rule invalidating release agreements, the availability of settlement options in civil rights cases will be barred as a practical matter. If releases are invalid, the problem of consideration for agreements will be an issue. Without an exchange of agreements, as in the release-discharge case, it is conceivable that only a substantial monetary consideration would suffice to support the existence of an enforceable agreement. This situation would not serve the public interest and would, therefore, effectively bar the settlement of civil rights claims against state officials.

A further reason to reverse the First Circuit *per se* rule is to avoid conflict with state law that upholds releases. In Massachusetts, once a person signs a waiver of the right to appear before a magistrate, the waiver itself constitutes a release of all claims for damages against the officer. *Horgan* v. *Boston Elevated Railway Co.*, 208 Mass. 287, 94 N.E. 386 (1911). Because most actions brought under 42 U.S.C. § 1983 also include pendent state claims for false arrest, battery and false imprisonment, a rule allowing the fact finder to determine the validity of a release would preclude the possible result that a release would bar a claim under state law but not bar the a claim under 42 U.S.C. § 1983 for the same occurrence.

III. The Decisions of This Court Relating to Plea Bargaining Support the Adoption of a Rule Upholding the Validity of Release Agreements in Appropriate Circumstances.

In its decision, the First Circuit Court of Appeals in the instant case placed special emphasis on the fact that a release agreement executed in a pre-conviction situation should be held void since the local authorities are in a position "to use the threat of prosecution as a sword." 778 F.2d at 69. The position taken by the First Circuit that the pre-conviction setting presents a potential for abuse which cannot be dealt with under the voluntary, deliberate and informed test, however, runs directly contrary to this Court's decisions in the area of plea bargaining.

Plea bargaining agreements between a prosecutor, representing the government, and a criminal defendant are obviously negotiated in the pre-conviction setting. Such agreements generally involve the government's willingness to drop some criminal charges or to recommend a more lenient sentence than it would otherwise seek in exchange for a guilty plea by the accused. These agreements have been sanctioned by this Court. *Mabry* v. *Johnson*, 104 S.Ct. 2543, 2547 (1984); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361-362 (1978); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977); *Brady* v. *United States*, 397 U.S. 742, 753 (1970).

In upholding plea bargaining agreements in general, this Court has subjected such agreements to scrutiny to determine whether the resulting guilty plea was voluntary and knowingly made.

> It is well-settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be col-

> laterally attacked. It is also well-settled that plea agreements are consistent with the requirements of voluntariness and intelligence — because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange. It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired.

Mabry v. *Johnson*, 104 S.Ct. at 2547. *See also Santobello* v. *New York*, 404 U.S. 257, 261-262 (1971) (footnotes omitted) (A plea in the context of plea bargaining must be "voluntary and knowing.").

Both this Court's rationale and the standard it imposes in the plea bargaining context apply with equal force in the context of pre-conviction release agreements. In both the plea bargaining situation, and situations involving releases of rights to sue for false arrest and false imprisonment given in exchange for the government's forebearance from pressing criminal charges, the threat of criminal prosecution exists. In both situations, however, an agreement has advantages for both the government and the accused. As previously discussed, the agreement in both contexts results in an efficient use of government resources and protects the public on one hand. On the other hand, the accused in the plea bargaining situation receives a less harsh result than might otherwise be anticipated, and the accused in the pre-conviction release agreement is spared criminal prosecution altogether. These striking similarities between the public policy considerations invoked in both plea bargaining and release situations were noted in *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 612-613 (1980). A guilty plea in a plea bargaining situation is an effective bar to a § 1983 claim. *Griffen* v.

City of Mount Vernon, 553 F. Supp. 1047, 1049 (S.D. N.Y. 1983); *Keyes* v. *City of Albany*, 594 F. Supp. 1147, 1155 (N.D. N.Y. 1984).

The adoption of a voluntary, deliberate and informed standard for upholding release agreements is therefore consistent with this Court's decisions in the area of plea bargaining.

IV. The Determination of Whether a Rule Should Be Adopted That Release Agreements Are Per Se Invalid Is a Question Suitable for Legislative Determination.

The Court of Appeals held that a covenant not to sue public officials "is void as against public policy." 778 F.2d at 71. It seems inappropriate for a Court of Appeals to formulate public policy when there is no broad-based support in either the United States Congress, other Courts of Appeals, state courts or legislatures for the proposition that releases are invalid irrespective of the circumstances.

In this case, a judge found that Rumery entered the release voluntarily and with advice of counsel. If such a release may or may not contravene the policy established by Congress in the Civil Rights Act, it should be for Congress to declare the appropriate public policy. Congress would have the benefit of hearing a variety of views. Congress could thereby balance the widespread use of releases against any abuse that may have in fact taken place.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Court should reverse the decision of the United States Court of Appeals for the First Circuit and adopt a rule upholding the validity of releases which are entered into in a voluntary, deliberate and informed manner.

Respectfully submitted,

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